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No. 95-1340

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY,

Petitioner,

v.

UNITED STATES *EX REL.* WILLIAM J. SCHUMER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The Washington Legal Foundation will address the following questions:

1. Whether the False Claims Act's "public disclosure" bar to suits by *qui tam* relators who are not original sources is activated when the misconduct at issue previously had been disclosed to a non-participant in the alleged fraudulent conduct.

2. Whether actual or potential financial loss to the government is an essential element of a claim under the False Claims Act.

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INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas of the law, WLF devotes a substantial portion of its resources to ensure that the civil justice system and the courts are not abused by excessive or unwarranted litigation. *See, e.g., Lujan v. Defenders of*

Wildlife, 504 U.S. 555 (1992) (lack of injury tc plaintiff precludes citizen suit under Article III); *BMW of North America, Inc. v. Gore*, 115 S. Ct. 1589 (1996) (excessive punitive damages violates Due Process Clause); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1993); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994) (constitutionality of *qui tam* provisions).

In particular, WLF believes that the *qui tam* provisions of the False Claims Act which themselves are constitutionally suspect, have been abused by the proliferation of "parasitic" lawsuits by relators in meritless cases such as this one. These meritless cases drain scarce judicial and governmental resources. WLF can bring a broader perspective to this case than can the parties, and believes that its participation will assist this Court in deciding the case. By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

STATEMENT

A. Introduction

The Federal False Claims Act ("FCA"), 31 U.S.C. §§ 3729-32 (1996), 18 U.S.C. § 287 (1995), is the government's principal civil and criminal weapon against fraud in federally-financed programs including defense contracting and health care. Most of the viable cases brought under the FCA have been originated or assumed by the Department of Justice; most of the cases brought by *qui tam* relators -- private individuals suing in the name of the United States -- have proved meritless and wasteful of the resources of the Justice Department, which is required

to investigate each such case. However, though the 1986 *qui tam* amendments to the FCA are precariously positioned as a constitutional matter, their offer of potentially-vast financial rewards to relators has created a kind of litigation lottery that has led to increasing numbers of relator suits and, because of draconian penalties and potential exclusion from federal programs, to increasing risk even to contractors who believe that they are law abiding but fear the vagaries and expense of litigation.

The nature and effect of the 1986 amendments require restraint in judicial interpretation of their reach. One particularly troublesome form of these *qui tam* cases is found in actions brought by "parasitic" relators -- persons who are not original sources of information provided to investigators but who latch on to active government investigations or corporate self-disclosures -- who bring suits that the government has concluded are unmeritorious or premature. Congress had sought to limit the reach of these parasites, while assuring that original sources and true whistleblowers could maintain actions in the name of the United States. Thus, the 1986 FCA amendments preclude a relator's action if the subject of his claim had been publicly disclosed, unless the relator was the original source of the information.

This Court should hold that "public" disclosure includes disclosure to *any* person not involved in the alleged fraud, and accordingly should reverse the judgment of the Ninth Circuit. This Court also should reverse because a false claim cannot properly be premised on conduct that neither caused nor could have caused any loss to the government.

B. Factual Background

In the interests of judicial economy, amicus hereby adopts by reference the statement of the case as presented by the Petitioner. Nevertheless, amicus wishes to highlight several salient facts.

Hughes Aircraft was a subcontractor to develop radar for four separate government programs. Hughes allocated costs among the four programs according to "commonality agreements," which typically allow for allocation of costs in government contracts where work is common to both.

It was undisputed that, during a government audit conducted several years before the instant suit was brought, the questions concerning the propriety of the commonality agreements about which the relator later complained were widely discussed among employees of Hughes, the prime contractor, Northrop, and the government. (*See* J.A. at 30 ¶ 3, 172 ¶ 7.) The government then withheld about $15.4 million in payments which were later made when the government concluded, during the normal dispute resolution process, that the commonality agreements had saved, not cost, the government money. *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1516 (9th Cir. 1995).

In 1989, the relator, a former Hughes employee, filed suit claiming that the company had violated the FCA by mischarging costs from a fixed-price government contract to a cost-reimbursement contract. After fully investigating the matter, the Justice Department declined to intervene. Ultimately, the Ninth Circuit held that, while the commonality accounting practices employed by Hughes complied with government regulations, and indeed "had

actually saved the government money," *id.*, the relator stated a viable FCA action by challenging the adequacy and timeliness of Hughes' disclosure of its accounting methods.

Hughes argued to the Ninth Circuit, among other things, that the undisputed disclosure of alleged fraud to "innocent employees" of a contractor constituted an actual public disclosure. The court rejected the argument and the reasoning of the Second Circuit in *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992). The court concluded that "the *Doe* court's treatment of employees as members of the public is unrealistic," *Hughes*, 63 F.3d at 1518, because such employees have strong incentives not to disclose their employer's misconduct to others and hence contravenes the intention of the drafters of the 1986 amendments to the FCA. The Ninth Circuit also held that the application sought by Hughes would run contrary to the purpose of the FCA by somehow restricting "the ability of insiders to bring suit once the government becomes involved in the matter." *Id.* at 1519.[1]

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[1] The Ninth Circuit also rejected Petitioner's argument that the potential availability through the Freedom of Information Act of the information concerning fraud constituted another means of public disclosure. Although the WLF sees merit in this argument, we concentrate our attention upon the *actual* disclosure that indisputably was made to persons not involved in the alleged fraud. Similarly, while it has not presented argument on the issue, WLF believes that Hughes has presented a meritorious argument that this case should be dismissed because the 1986 amendments to the FCA should not be afforded retroactive application.

SUMMARY OF ARGUMENT

Of the various arguments presented to the Court, WLF addresses two of them: 1) the applicability of the "public disclosure" bar to parasitic *qui tam* lawsuits under the FCA; and 2) the absence of any cognizable "claim" upon which an FCA suit could be based. Congress expressed a strong desire to bar *qui tam* actions brought by persons who were not the original source of the allegations of fraud, when there has been a prior "public" disclosure of the information at issue. Among the means specified for such disclosures are government audits and investigations. In the instant case, the information upon which the relator's case was based had been disclosed to "innocent" individuals in the context of the sort of administrative audit and investigation specifically described in the statutory bar to parasitic suits. Given the plain meaning of the statute, the constitutional precariousness of the *qui tam* regime, and the need for maximum clarity in view of the vast risks that even innocent contractors experience through FCA litigation, this Court should adopt the reasoning of the Second, Third and Tenth Circuits, holding that public disclosure occurs when the subject of the fraud is revealed to any stranger to the fraud. This satisfies the FCA's definition of "public" and the congressional intent to encourage fraud cases. Because of the onus of the FCA and because most of the cases in this burgeoning area of the law turn out to be non-meritorious, this Court also should adopt a bright-line rule for the summary disposition of public disclosure issues.

The Ninth Circuit also erred in holding that the relator had set forth a "claim" within the meaning of the FCA. The court of appeals itself recognized that the accounting procedures at issue not only had resulted in no loss to the

government but indeed had saved it money. In order to satisfy the constitutional case-or-controversy requirement of injury in fact, as well as the plain meaning of the statute, an FCA case must be based upon an actual or, in the case of an attempt, potential loss to the public fisc. Under the statute, "claim" is equated to an attempt to get payment; if a prohibited payment was impossible because the government suffered no loss, there is no "claim." While Hughes might have made an untimely or inaccurate "statement" -- subject to other federal laws or regulations -- it did not present a false "claim."

ARGUMENT

I. BECAUSE THERE WAS A "PUBLIC DISCLOSURE" OF THE ALLEGED FRAUD PRECEDING THE LAWSUIT, THE JURISDICTIONAL BAR AGAINST PARASITIC RELATORS APPLIES.

A. The Statutory Framework and the Jurisdictional Bar.

Expressing a congressional desire to prevent purely "parasitic" actions, the 1986 amendments to the FCA bar any would-be *qui tam* plaintiff from bringing suit if the information on which the action is based has been publicly disclosed and the relator is not the original source of the disclosed information. 31 U.S.C. § 3730(e)(4). The complaint here represents exactly the type of "parasitic" suit that Congress intended to preclude when it amended the law.

The FCA creates liability for any individual who "knowingly presents . . . to an officer or employee of the

United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). A private citizen may bring a claim on behalf of himself and the United States Government for a violation of the FCA. 31 U.S.C. § 3730(b). The government is given an opportunity to investigate the complaint and determine whether to intervene and proceed with the action, and if the government declines to intervene (which is the case here), the private citizen may proceed with the action alone. 31 U.S.C. § 3730(e)(4). But he may do so only if he is not barred by the jurisdictional impediments set out in 31 U.S.C. § 3730(e).

From the FCA's original passage until 1943, someone could originate a suit based on privately-obtained, or even publicly-available, information, and could maintain it to the exclusion of the Attorney General. In 1943, Congress amended the Act in response to the Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), to prevent "parasitical" suits. The 1943 amendments added a jurisdictional provision barring *qui tam* actions whenever the government had prior knowledge of the information in the complaint. Those amendments also authorized the Attorney General to enter the *qui tam* action and assume sole responsibility for its conduct. The relator still could continue the prosecution on his own if the Attorney General declined to take it over. In 1986, Congress amended the bar on "parasitical" suits and provided the relator with an ongoing, active litigation role even when the Attorney General enters the case.

From the inception of the FCA, the *qui tam* provisions attempted to satisfy competing interests: the creation of incentives designed to encourage disclosure of first-hand information regarding false claims in order to facilitate

private legal action by persons possessing such information, and the establishment of statutory protections designed to prevent opportunistic plaintiffs from filing frivolous actions. *United States ex rel. Barth v. Ridgedale Elec., Inc.*, 44 F.3d 699, 702 (8th Cir. 1995).

Section 3730(e)(4)(A) now provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A).

Section 3730(e)(4) was "designed to preclude *qui tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator." *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1155-56 (3d Cir. 1991). To comply with this jurisdictional limitation, a relator must establish either that there has been no prior "public disclosure" of the information on which his complaint is based or that he was the "original source" of the information. *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1416 (9th Cir. 1992). "[T]he False Claims Act should not be read in a manner that impermissibly expands federal jurisdiction. [The relator] thus bears the burden of alleging facts essential to jurisdiction and

supporting those facts by competent proof." *United States ex rel. Fine v. MK-Ferguson*, 1996 WL 638479 at *5 (10th Cir. Nov. 6, 1996) (citation omitted); *see also*, *Pricè v. United States Gen. Servs. Admin.*, 894 F.2d 323, 324 (9th Cir. 1990); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). The Ninth Circuit was manifestly incorrect in concluding that this relator, who clearly is not an original source and who bears the burden of proof on the issue of jurisdiction, demonstrated that there had not been a public disclosure that should have barred his suit.

B. "Public Disclosure" Includes Disclosure By the Government to Private Individuals Previously Unaware of the Fraud.

"[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980). Using normal rules of grammar, the jurisdictional bar can be restated as: FCA jurisdiction is foreclosed if the underlying allegations had been disclosed to the "public," *i.e.*, to a stranger to the fraud, through an administrative report, audit, or investigation. "Disclose" is defined as "to expose to view" or "to make known." Webster's Third New International Dictionary 645 (1981). In this instance government auditors who were investigating possible fraud made known their investigation and the allegations and transactions that later would undergird the instant suit to Hughes and Northrop employees who had not been aware of any fraud. Contrary to the illogical reading of the statutory bar given by the Ninth Circuit, this is precisely

one form of "public disclosure" anticipated by Congress in section 3730(e)(4)(A).

The Second, Third, and Tenth Circuits have opined as to what qualifies as a "public disclosure" and how widely disseminated the underlying information must be. *See Doe*, 960 F.2d 318; *Stinson*, 944 F.2d 1149; *MK-Ferguson*, 1996 WL 638479; *United States ex rel. Fine v. Advanced Sciences*, 1996 WL 638448 (10th Cir. Nov. 6, 1996). Generally, these circuits have "construed 'public' strictly to reach disclosures revealed to a single person, and even to reach information that has not been disclosed to the 'public,' but merely is accessible to the public." Robert Salcido, *Screening out Unworthy Whistleblower Actions: An Historical Analysis of The Public Disclosure Jurisdictional Bar to Qui Tam Actions Under the False Claims Act*, 24 Pub. Cont. L.J. 237, 238 (1995). The bright line rule adopted by the Second, Third and Tenth Circuits is both workable and textually warranted.

"Public disclosure" as defined by the False Claims Act is "a general phrase, not specifically limited by the enumerated examples in the remainder of the statute." *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 736 F. Supp. 614, 621 (D.N.J. 1990), *aff'd*, 944 F.2d 1149 (3d Cir. 1991). As the Tenth Circuit recently stated:

> "[I]n order for the jurisdictional bar to apply, the allegations of fraud or fraudulent transactions must be contained in one of the forms, or be available from one of the sources, listed in section 3730(e)(4)(A). That section defines the sources of allegations and transactions which trigger the bar

but it does not define the only means by which public disclosure can occur."

Advanced Sciences, 1996 WL 638448 at *4 (citations omitted); *see also*, *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994) (*Qui tam* actions are barred "when either the allegation of fraud or the critical elements of the fraudulent transaction themselves were in the public domain.").

As noted above, the natural reading of the text of the jurisdictional bar has led the Second, Third, and Tenth Circuits to conclude that a public disclosure occurs when information concerning the allegations or transactions is revealed to one or more persons who had no prior knowledge of the fraud. The "public disclosure" jurisdictional bar was designed to prohibit all suits "based upon allegations" of fraud that are accessible to "strangers to the fraud."

> Because *qui tam* plaintiffs ('relators') are entitled to a portion of the proceeds of successful suits, there is the potential for parasitic lawsuits by those who learn of the fraud through public channels and seek remuneration although they contributed nothing to the exposure of the fraud. To discourage such chicanery, Congress carefully crafted a jurisdictional bar to *qui tam* claims that are based on publicly disclosed information.

Doe, 960 F.2d at 319; *see Advanced Sciences*, 1996 WL 638448 at *1 ("[P]ublic disclosure occurs when the allegations of fraud or fraudulent transactions upon which the *qui tam* suit is based are affirmatively disclosed to members of the public who are otherwise strangers to the fraud.").

Doe was a case in which investigators made "innocent employees," *i.e.* those not involved in the alleged fraud, aware of the alleged fraud. In holding that this amounted to "public disclosure," the court noted that because "the disclosure occurred in a combined criminal and administrative investigation, and because the administrative investigations are listed in the statute, the action is barred." *Doe*, 960 F.2d at 322-23. The Third and Tenth Circuits have held similarly. *Stinson*, 944 F.2d 1149; *MK-Ferguson*, 1996 WL 638479; *Advanced Sciences*, 1996 WL 638448. The holdings of all of these three courts of appeals, logical in themselves, are equally applicable to the investigative disclosure to uninvolved persons here.[2]

In *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1990), the Second Circuit held that allegations of fraud are publicly disclosed when they are placed in the "public domain." *Id.* at 18 ("The fact that [the allegations of fraud] may not be widely disseminated does not inure to the benefit of a *qui tam* relator."). That is precisely what has occurred here, and it has occurred through means -- the disclosure of an administrative audit and investigation -- specifically described by Congress in crafting the jurisdictional bar to parasitic relators such as Respondent.

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[2] Even the dissent in *Doe* would apply the jurisdictional bar where the information was not actually in the hands of an innocent employee, but merely "generally accessible by the public." *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 325 (2d Cir. 1992) (Walker, J., dissenting).

A strict reading of the "public disclosure" bar satisfies the policy need that Congress intended to address. A whistleblower presents no advantage to the public when the transactions of which he would complain are already in the public domain. Once the government has been informed of an alleged fraud and has begun an "administrative investigation," public disclosure will likely occur, inasmuch as during the investigation, "strangers to the fraud" will learn of the underlying allegations and transactions.

However, in the event that the government does not pursue fraudulent conduct, the matter will not escape further public scrutiny. Notwithstanding public disclosure, a relator who is an original source of the information reported may proceed with a *qui tam* lawsuit. 31 U.S.C. § 3730(e)(4)(B). "*Qui tam* suits are meant to encourage insiders privy to a fraud on the government to blow the whistle on the crime. In such a scheme, there is little point in rewarding a second toot." *Wang*, 975 F.2d at 1419. If the relator would not have known the information without the public disclosure, he does not have "direct and independent knowledge" of the information. *Houck on Behalf of the United States v. Folding Carton Admin. Comm.*, 881 F.2d 494, 505 (7th Cir. 1989); *see also, Dick*, 912 F.2d at 18 ("[I]f the information on which a *qui tam* suit is based is in the public domain, and the *qui tam* plaintiff was not a source of that information, then the suit is barred").

C. The Ninth Circuit's Reasoning as to Public Disclosure is Illogical.

In rejecting the bright line rule of *Doe*, the Ninth Circuit opined that "[b]ecause the employee has a strong economic incentive to protect the information from

outsiders, revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure." *Hughes*, 63 F.3d at 1518. The instant case demonstrates the illogic of this conclusion. We note at the outset that the FCA mandates protection to whistleblowers against retaliation by employers.[3] 31 U.S.C. § 3730(h). This provision permits awards of double back pay, along with interest and special damages, *id.*, over and above the 25 to 30% of the settlement or award the relator might receive if his suit were successful. 31 U.S.C. § 3730(d)(2).

Besides these protections, the financial incentives for employees and non-employees alike are so vast that it is no surprise that employees commonly bring *qui tam* cases. Indeed, the relator himself was a Hughes employee. In short, the steady rise in *qui tam* filings suggest no impediment, psychological or otherwise, to the bringing of such claims. In fiscal year 1987, just after the effective date of the 1986 amendments, only 33 *qui tam* suits were filed. This number has skyrocketed over 800 hundred percent. For example, in fiscal year 1995, the most recent year for which there are published data, relators filed 274 *qui tam* suits, and the number is growing. Stuart M. Gerson, *Issues and Developments in Qui Tam Suits Under the Federal False Claims Act*, *in* Citizen Suits and Qui Tam Actions: Private Enforcement of Public Policy 140 (1996) (citing U.S. Dep't of Justice Press Release, *Justice Department Recovers Over $1 Billion in Qui Tam Awards and Settlements* (Oct. 18, 1995)).

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[3] *Qui tam* suits are filed in camera, 31 U.S.C. § 3730(b)(2), and a relator may move the court to have his or her name remain under seal, as was the case in *Doe*, 960 F.2d 318.

Indeed, if there is any problem at all, it is that so many *qui tam* suits are being filed that the Department of Justice's Civil Division resources have been stretched to the breaking point. For example, six months prior to the enactment of the 1986 FCA amendments, Civil Division attorneys devoted approximately 1,100 hours on *qui tam* matters. In contrast, from January to June 1990, the Civil Division spent roughly 11,000 hours on *qui tam* matters. William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 Loy. L.A. L. Rev. 1799, 1840 (1996) (citation omitted). With the increasing number of *qui tam* cases filed since then, the investigative time has grown proportionately. This is explained not only by the explosion in the number of *qui tam* suits filed, but also the fact that the Department of Justice must investigate each suit to determine whether or not to join the relator. 31 U.S.C. § 3730(b).

Since the 1986 amendments through fiscal year 1995, when the Department of Justice intervened or settled FCA cases, recoveries of $1,058,177,552 have resulted. Yet, when the government has declined to intervene and the relator "goes it alone" the results have diminished considerably, recovering $15,597,141, approximately *one* percent of the total. *U.S. Dep't of Justice, Justice Department Recovers Over $1 Billion in Qui Tam Awards and Settlements* (Oct. 18, 1995). Inasmuch as a majority of these suits is deemed unmeritorious by the Department of Justice and rarely produces awards where the Department does not intervene, it is clear that if there is any problem at all, it is that the lucrative potential awards are encouraging too many, not too few, relators' actions. The Ninth Circuit's reasoning is contradicted by this fact.

D. A Bright Line Rule Regarding "Public Disclosure" Is Consistent with the Purpose of the FCA.

The 1986 amendments to the FCA were designed to encourage employees, former employees and other putative "whistleblowers" with inside knowledge to come forward with evidence of "false claims". *Overview of False Claims and Fraud Legislation: Hearing Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 12 (1986) (S. Hrg. 99-976) (statement of R. Willard, Asst. Att'y Gen.). At the same time, the 1986 amendments were carefully crafted to continue to prevent "parasitic" lawsuits of the kind that prompted the previously enacted 1943 amendments.

In order to limit actions to those individuals who could benefit the government because of their possession of first-hand knowledge of fraud, Congress enacted four jurisdictional bars, including the public disclosure bar at issue here. A strict reading of each of these bars is consistent with congressional intendment. However the vast number of unmeritorious *qui tam* actions, many of them brought by parasitic relators, suggest that judicial screening of such cases has been insufficiently stringent. This Court should adopt a bright line standard whereby "public disclosure" must be found to have occurred whenever any person unrelated to the fraud is informed of the activities that might give rise to an FCA suit. Any such individual is perfectly able to act as Congress intended relators to act. There is no useful distinction to be drawn, *e.g.*, between employee and non-employee relators, given the number of *qui tam* cases that are entering the federal courts. It is unduly burdensome to both defendants, a

statistical majority[4] of whom is nonculpable and to the courts themselves to engage in a broad-based, pretrial litigation over whether a particular kind of potential relator falls within or without the public disclosure bar.

The purpose of the FCA is met whether the disclosure reaches a small audience or a large one. "Indeed, an audience of one is sufficient because, as the Third Circuit pointed out in *Stinson*, that one person may disclose the information to many." Salcido, *supra*, at 265.[5] A restrictive interpretation of the "public disclosure" bar

> is consistent with practical considerations of judicial economy. It is one thing to expect the court to evaluate the quantity and quality of information in the public domain versus that possessed by the *qui tam* plaintiff after trial for purposes of fee determination; it is quite another to expect a similar evaluation as part of a pre-trial jurisdictional inquiry. This type pre-trial inquiry would be onerous, impractical and ultimately would serve neither the interests of the parties nor the court.

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[4] By the end of fiscal year 1994 (the most recent year for which there are published data on this statistic), 21 of the 455 *qui tam* cases the Department of Justice declined to pursue had resulted in a recovery. *Qui Tam Suits: Government Has Recovered $800 Million Through Whistle-blower Litigation*, BNA Fed. Cont. Daily, Nov. 10, 1994 at d4.

[5] Amicus notes with the growing use of computers, one person can disclose information to the entire world by posting it on the Internet.

United States ex rel. Precision Co. v. Koch Indus., Inc., 971 F.2d 548, 551-52 (10th Cir. 1992).

It is hardly sensible for courts to hold on one hand that suits based on publicized, completed investigations are barred, but suits based on continuing investigations are permitted. Nor is it sensible to hold that a *qui tam* recovery could be allowed even where a case is under active negotiation and the government is about to get recovery in full, on its own. Instead, this Court should hold that trial courts should make early determinations as to whether a non-original source relator may proceed solely on the basis of whether the facts at issue have been disclosed to anyone not a party to the alleged fraud. All such persons are empowered to bring a *qui tam* action if there has not been public disclosure and this more than satisfies the congressional intent to encourage private anti-fraud litigation.

E. The Uncertain Constitutionality of FCA Actions Requires a Narrow Interpretation of *Qui Tam* Jurisdiction.

Although Amicus recognizes that the Court did not grant review on the constitutional questions presented, nevertheless, those questions should inform the Court as to the disposition to the statutory issues presented.

The clear congressional antipathy to parasitic claims itself suggests that *qui tam* jurisdiction should be closely cabined and, accordingly, that the public disclosure bar should be read strictly. In view of the serious constitutional problems surrounding a relator's separate maintenance of a case in the name of the United States, this Court should adopt the narrowest plausible interpretation of

qui tam jurisdiction. *Cf. Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This Court, in other words, need not and must not construe the scope of the FCA's *qui tam* provisions in a constitutional vacuum.

Qui tam litigation may enjoy considerable historical precedent, *see Marcus*, 317 U.S. at 541 n.4, but the constitutional principles it seemingly contradicts are fundamental. Congress cannot delegate to private parties the power to enforce, in a nominal governmental capacity, the laws of the United States. That is a core power of the Executive Branch, and deeply-rooted separation-of-powers principles should prevent (or, here, starkly limit), the alienation of this power by the legislature.

The FCA "let[s] loose a posse of *ad hoc* deputies to uncover and prosecute frauds against the government." *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992). The Attorney General, who plays no role in appointing relators, cannot prevent a *qui tam* action from being filed. And, although the Attorney General has the right to intervene in an action, *see* 31 U.S.C. § 3730(b)(2), she can neither remove the relator nor apparently dismiss the action without court approval. *See id.* § 3730(c)(2). This case itself represents such an encroachment: the relator has continued to press it on behalf and in the name of the United States notwithstanding the Executive's conclusion that it is unwarranted.

A corollary to this general separation-of-powers point is that the FCA's *qui tam* provisions also raise serious questions under the Appointments Clause, U.S. Const. Art. II, § 2, cl. 2. The maintenance of an FCA case is an

undoubtable exercise of significant governmental authority. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 124-27, 140 (1976) (*per curiam*). But *qui tam* relators are appointed by no one but themselves, and it is questionable that Congress, consistent with the Appointments Clause, should assign execution of the laws to such self-appointed officers. *Cf. Public Citizen v. Department of Justice*, 491 U.S. 440, 485-86 (1989) (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, J., concurring).

It also is far from clear whether Congress can, consistent with the "case or controversy" requirement of Article III, confer standing on *qui tam* relators to litigate on behalf and in the name of the United States. The only conceivable "injury-in-fact" suffered by a qui tam relator is the loss of a statutory bounty created by Congress. Such an "injury," however does not satisfy the "irreducible constitutional minima" required by Article III. *Cf. Diamond v. Charles*, 476 U.S. 54, 69-71 (1986); *In re Confiscation Cases*, 74 U.S. (7 Wall.) 454, 458-59 (1868); *United States v. Morris*, 23 U.S. (10 Wheat.) 246 (1825); *Lujan*, 504 U.S. at 576-78. In this case, no one, the government itself included, has suffered economic injury (an independent reason for reversal, see *infra* at 23), but in no case such as this does a relator suffer such harm.

Historical reasons may be among those causing the Court to decline to consider a facial constitutional challenge to the validity of the *qui tam* amendments. However, in deciding the issues before it, we believe that the seeming constitutional anomaly of *qui tam* litigation requires constitutional prudence and restrictive textual interpretation of the reach of the amendments, especially as they relate to the parasitic suits which the Congress itself found unnecessary and objectionable.

F. The Rule of Lenity Also Requires a Narrow Reading of *Qui Tam* Jurisdiction.

The FCA is both a civil and criminal statute. 31 U.S.C. §§ 3729-32; 18 U.S.C. § 287. The "Rule of Lenity" requires that "ambiguous laws which impose penal sanctions are to be strictly construed against the Government." *United States v. Margiotta*, 688 F.2d 108, 120 (2d Cir. 1983). *United States v. Thompson/Center Arms*, 504 U.S. 505, 518 n.10 (1992); *see also*, *Crandon v. United States*, 494 U.S. 152, 168 (1990) (applying lenity in interpreting a criminal statute invoked in a civil action). "The doctrine of lenity is, of course, sound, for the citizen is entitled to fair notice of what sort of conduct may give rise to punishment." *McNally v. United States*, 483 U.S. 350, 374 (1987).

The FCA assesses a hefty liability: treble damages sustained by the Government, in addition to a $5,000 to $10,000 penalty for each false claim. 31 U.S.C. § 3729(a). The number of false claims submitted to the government can give rise to penalty assessments that overwhelmingly exceed the amount lost to the Treasury. Damages under the FCA are not solely based on the size of the claims submitted. They are also calculated on a per claim basis, even if the claim is never paid. *United States v. Bornstein*, 423 U.S. 303 (1976). Where, as here, the FCA is being used a punitive measure rather than a remedial one -- because there was no overpayment (because Hughes was entitled to the payments received) -- the Rule of Lenity applies.

In addition to draconian financial penalties, a government contractor may also face debarment or suspension from further government contracting. 10

U.S.C. § 2393(c) (1996); 48 C.F.R. § 9.403 (1995). In addition the contractor is debarred from serving as a subcontractor to a nondebarred prime contractor. 48 C.F.R. § 9.405 (1995). Debarment and suspension from one agency automatically extends to procurement activities with all other agencies. 48 C.F.R. §§ 9.406-1(c), 9.407-1(d) (1995). Thus, the penalties of FCA litigation are so severe, that the Rule of Lenity must require a narrow interpretation of who might bring such a suit in order that order that the consequences of a potential defendant's actions be predictable to him. Clearly, in the conduct of investigations and audits, and considering the advisability of self-disclosure that might lead to such a proceeding, a federal contractor ought to be able to participate candidly without the fear that a parasitic relator will expand its risk by bringing a civil action.

II. THIS ACTION SHOULD BE DISMISSED FOR WANT OF A CASE OR CONTROVERSY BECAUSE MERE TECHNICAL COST ACCOUNTING STANDARDS VIOLATIONS DO NOT INJURE THE PUBLIC FISC.

As we suggested in the previous argument, the literal terms of the statute, the clear congressional mandate to construe it restrictively as to parasites, the weight of constitutional doubt surrounding *qui tam* actions and the rule of lenity all mandate that the public disclosure bar of section 3730(e) be read restrictively. These same considerations, we submit, mandate reversal of the Ninth Circuit on the ground that there was no injury-in-fact in this case, not just to the relator, but to anyone. As the Ninth Circuit itself specifically held, the accounting procedures adopted by the company actually resulted in savings to the government. *Hughes*, 63 F.3d at 1516. That

should have ended the matter, but the Court went on to hold that there was a potential FCA violation in the fact that the accounting methods at issue were not timely disclosed. *Id.* at 1525. This holding violated both statutory and constitutional mandates and should be reversed. A false "statement," in and of itself, is not the equivalent of a false "claim," and it tortures the FCA to extend it this way.[6]

A. Respondent Has Not Satisfied the Article III Requirement of Injury-in-Fact.

Although the Constitution might not prohibit Congress from granting standing to a relator suing on behalf of the government to remedy an injury to the United States, *Marcus*, 317 U.S. 537, no plaintiff, including the government itself, who cannot demonstrate the constitutional minimum of injury-in-fact may maintain a lawsuit in federal court. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 488 n.24 (1982). It is "[t]he government, and not the relator, [who] must have suffered the 'injury-in-fact' required for Article III standing." *Milam*, 961 F.2d at 49. Given the Ninth Circuit's recognition that the conduct at issue saved the government money, its ultimate holding is inexplicable. Because the government cannot

[6] There are prohibitions against making false statements. *See* 18 U.S.C. § 1001 (1996). Congress could have included the making of mere false statements in the FCA's definitions, but it did not do so. *Cf.* 31 U.S.C. § 3279(a)(2).

meet the constitutional minimum of injury-in-fact here, neither can the relator.[7]

B. While the Issues Remaining Might Be Based Upon false Statements, They Are Not Derived From "Claims" Within the Meaning of the FCA.

"The False Claims Act was not designed to reach every kind of fraud practiced on the Government." *United States v. McNinch*, 356 U.S. 595, 599 (1958). A claim for payment or approval "normally connotes a demand for money or for some transfer of public property." *United States v. Lawson*, 522 F. Supp. 746, 750 (D.N.J. 1981) (citing *McNinch*, 356 U.S. at 599).

The FCA defines "claim" to include

> any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other

[7] Although the Court limited its grant of *certiorari* to the statutory issues, including that related to the public fisc, while declining to consider a facial constitutional challenge to the *qui tam* provisions, the issue of standing as applied in a particular case is always reviewable by this Court because it is a jurisdictional question. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230 (1990).

recipient for any portion of the money or property which is requested or demanded.

31 U.S.C. § 3729(c). "[O]nly (i) 'actions which have the purpose and effect of causing the government to pay out money' where it is not due, or (ii) actions which intentionally deprive the government of money it is lawfully owed, are considered 'claims' within the meaning of the FCA." *United States ex rel. Windsor v. DynCorp, Inc.*, 895 F. Supp. 844, 850 (E.D. Va. 1995) (citations omitted). While "there is no requirement, statutory or judicial, that specific damages be shown," *Rex Trailer v. United States*, 350 U.S. 148, 152 (1956), an FCA claim must be derived from the presentation of "a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1).

This terminology clearly implies an act which either has secured or attempted to get payment. *United States v. Neifert-White Co.*, 390 U.S. 228, 233 (1968). A mere false statement or non-disclosure cannot satisfy this definition. Thus, the Ninth Circuit's holding that Hughes might not have sufficiently disclosed[8] the terms of the commonality agreements, (Pet. *Cert.* at 20a, 24a), can not amount to a "claim," much less a false one. *Peterson v. Weinberger*, 508 F.2d 45, 52 (5th Cir. 1975) ("A claim is

[8] We note that the Resident Auditor of the Defense Contract Audit Agency found (two years after the relator's original suit was filed) that "the cost allocation system adopted pursuant to Hughes' internal commonality agreements was disclosed to Northrop and the Air Force. Therefore, the contractor's claim for reimbursement of costs incurred on the B-2 radar contract is valid." (J.A. at 134.)

within the purview of the False Claims Act if it is grounded in fraud which might result in financial loss to the Government.").

The Ninth Circuit suggested that the alleged defects in Hughes's disclosure of its commonality accounting methods to Northrop and the Government "may" have rendered unspecified costs "unallowable" within the meaning of a federal regulation. *Hughes*, 63 F.3d at 1525. This purely procedural and immaterial alleged violation of the Cost Accounting Standards ("CAS") simply is not a "false claim" as intended under the FCA. To begin with, notwithstanding the alleged CAS violation, the administrative contracting officer found that Hughes was entitled to be paid for all of the costs that Hughes incurred. J.A. at 134. First, the decision of the Defense Contract Audit Agency ("DCAA") suggests that there were no such unallowable costs. "We concur with the contractor's claim for reimbursement of costs incurred for the design, development, fabrication, assembly, and testing of modules and components incorporated into the Analog Signal Converter and Radar Data Processor units for the B-2 radar system."[9] (J.A. at 134.)

Second, the disclosure, however complete or incomplete it might have been, could have been no more than a technical violation of the CAS. It was not a "claim" as it is defined by the FCA or as is commonly understood.

[9] The government audit only determined that Hughes's practices were not disclosed in a timely fashion, and "therefore not in compliance with its disclosure statement." (Pet. *Cert.* at 66a.) But, because the noncompliance did not have a "significant cost impact," it was found to be "not material." *Id.*

"Logically, then, any claims for payment based on work that satisfied [Hughes's] contractual obligations to the AF could not have been 'false or fraudulent' within the meaning of the FCA." *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1412 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1319 (1996). This is because "a determination by a contracting officer that a cost is allowable, combined with payment of that cost, binds the government so that no challenge to the allowability of the cost can be maintained." J. Cibinic & R. Nash, *Cost-Reimbursement Contracting* 1106 (2d ed. 1993); *see United States v. TDC Management Corp.*, 24 F.3d 292 (D.C. Cir. 1994).

Whether as a matter simple literal construction or of strict interpretation, in view of potential constitutional issues, or the Rule of Lenity, the Court should not transmogrify technical violations of complicated government regulations into a false "claim." The FCA should only apply to those whose conduct is "sufficiently culpable to justify the formidable remedies enacted by Congress in its efforts to minimize procurement fraud." Allan J. Joseph *et al.*, *Update: Defective Pricing - When Is It Defective? When Is It Fraud?*, 54 Fed. Cont. Rept. (BNA) 136 (July 30, 1990). This is particularly true with *qui tam* suits where "[f]aulty diagnoses of observed behavior are inescapable given the complexity and murkiness of the regulatory commands controlling government contractors. . . . Relators may be particularly prone to misapprehend the legal significance of contractor efforts to comply with the government's complex cost allocation and accounting conventions." Kovacic, *supra*, at 1831-32 (footnotes omitted).

The standards for government contracting, such as the CAS, are such that "Congress, agency regulators, courts and Boards have been unable to define [them] with precision." Joseph, *supra*, at 136. Especially considering the financial and debarment risks posed to contractors by the FCA, "claim" must be read to exclude merely technical violations of complex regulations, so that the lack of precision in defining the regulations will not give rise to liability to unknowing government contractors.

Hughes's untimely disclosure, which did *not* lead to any "unallowable" costs, is analogous to a government contractor's not submitting payroll reports in a timely fashion. In considering such conduct under the FCA in the *Windsor* case, the district court found that there was "simply no falsity, no misrepresentation, in a contractor's failure to submit required payroll reports or to do so in a timely fashion. . . . Moreover, a contractor's failure to submit payroll reports, in and of itself, causes no economic loss to the government and is not a 'claim' within the meaning of the FCA." 895 F. Supp. at 850. That court provided an example for illustration that is instructive in this case:

> [C]onsider, for example, a situation where the workers were paid properly, but DynCorp failed to submit the required documentation. In that event, there would certainly be no false claim for payment, despite the reporting violation. This example demonstrates that the mere failure to submit required payroll reports, without more, does not subject the delinquent contractor to FCA liability. There is simply no logical nexus

between the failure to submit reports, by itself, and economic injury to the government.

Id.

The Ninth Circuit missed this point and ignored the constitutional mandate that a federal lawsuit must be predicated upon a true case or controversy, which itself requires injury-in-fact. *Valley Forge*, 454 U.S. at 488 n.24. There was no such injury here and so there was no "claim" upon which to base relief under the FCA. The complaint should be dismissed.

CONCLUSION

For these reasons, the judgment of the Ninth Circuit should be reversed, and this action should be remanded with instructions that the complaint should be dismissed because the public disclosure bar of the FCA precludes the action and because the relator has not set forth a "claim" within the meaning of the FCA.

Respectfully submitted,

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